BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: COURTNEY W. Claimant, vs. HARBOR REGIONAL CENTER, HRC.	OAH No. L 2006040514

DECISION

Sandra L. Hitt, Administrative Law Judge (ALJ), Office of Administrative Hearings, (OAH) heard this matter on August 14, 2006, at Torrance, California.

Duke W. (Courtney's adoptive father) represented Claimant Courtney W.[1]

Mona Hanna, Attorney at Law, represented Harbor Regional Center (HRC or Regional Center).

Oral and documentary evidence having been received and the matter having been submitted on August 14, 2006, the ALJ issues the following Decision.

ISSUES

1. Whether OAH has jurisdiction to decide this matter.

2. Should Claimant's Alternative Residential Rate Model (ARRM) rating be increased from a Service Level 3 to Service Level 4?

COMBINED FINDINGS OF FACT AND LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) is a comprehensive statutory scheme designed to provide supports and services for persons with

[1] Courtney's last name and that of her parents will be represented by the initial "W" herein, to protect the privacy of the minor child.

developmental disabilities.[2] The Act has a two-fold purpose: (1) to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community; and (2) to enable developmentally disabled persons to approximate the pattern of living of non-disabled persons of the same age and to lead more independent and productive lives in the community. (Welf. & Inst. Code, §§ 4501, 4509, 4685, 4750 & 4751; see generally *Association for Retarded Persons v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.) The Department of Developmental Services (DDS) is the state agency required to implement the Lanterman Act. It carries out that responsibility by delivering its services through the various Regional Centers located statewide.

> [T]he Legislature has fashioned a system in which both state agencies and private entities have functions. Broadly, DDS, a state agency, "has jurisdiction over the execution of the laws relating to the care, custody, and treatment of developmentally disabled persons" (§4416), while "Regional Centers," operated by private nonprofit community agencies under contract with DDS, are charged with providing developmentally disabled persons with "access to the facilities and services best suited to them throughout their lifetime" (§4620). (*Association of Retarded Persons, supra. at p. 389.)*

2. The Adoption Assistance Program (AAP) is a program designed to encourage adoption of children who might otherwise not likely be adopted. The AAP is administered by the Department of Social Services (DSS). DDS bears no responsibility for administering that program.

3. Pursuant to Welfare and Institutions Code section 16118, subdivision (c), either DSS or the county responsible for the person participating in the program determines the amount of AAP benefits payable to the participant's adopting family. To that end, DSS adopted California Code of Regulations, title 22, section 35333, which states in pertinent part:

> The AAP benefit is a negotiated amount based upon the needs of the child and the circumstances of the adoptive family. The responsible public agency shall negotiate the amount of the AAP benefit and make the final determination of the amount according to the requirements of this section.

Subdivision (c)(1)(C) of the same regulation addresses the maximum AAP rate for children who are also clients of a Regional Center, as follows:

> If the child is a client of a California Regional Center (CRC) for the Developmentally Disabled, the maximum rate shall be the foster family home

[2] The Lanterman Act is codified at Welfare and Institutions Code section 4500 et seq. All references to the code herein are references to the Welfare and Institutions Code unless otherwise indicated.

rate formally determined for the child by the Regional Center using the facility rates established by the California Department of Developmental Services. . . .

4. Residential facilities in which Regional Center consumers may be placed are rated by a service level.[3] The service levels range from 1 to 4, with facilities approved at Service Level 4 caring for the most severely disabled consumers. Service Level 4 is subdivided into Levels 4(A) through 4(I), with increasing staffing and professional consultant requirements that correspond to the escalating severity of the consumers' disabilities. (Cal. Code Regs., tit. 17, § 56004, subd. (c).) The rates paid to the facilities by the Regional Centers are commensurate with the facilities' service levels.

In determining the AAP rate of financial support for Regional Center AAP children (sometimes referred to as "dual agency clients"), the responsible county social service department relies upon DDS residential facility rates. Stated in the alternative, the responsible county will pay the adoptive family an amount of money not greater than it would cost to care for the child in a licensed residential care facility.

A Regional Center determines the appropriate service level for a facility using the ARRM, a scale used to determine the rate at which the facility is to be compensated for providing appropriate care, given the consumer's particular disabilities and needs. In determining an actual placement in an institutional setting, HRC convenes a "Living Options Committee" which considers the child's needs, the desires of the parents, and the location and availability of an appropriate facility. In order to establish an ARRM rate for a child living at home, the Regional Center must make a "hypothetical placement." After making such a hypothetical placement, the HRC issues a "rate letter." Patricia Del Monico, Director of HRC, testified that DSS/DFCS use the rate letters as a point from which to negotiate downward the amount of the AAP payment to adoptive families.

5. Since at least 2004, the Regional Centers have taken the position that they have no obligation to issue "rate letters." DFCS has taken the position that under the State of California Adoption Users Manual of Policies and Procedures, ARRM rates must be formally determined by the Regional Center. This places Regional Center clients receiving AAP payments between Scylla and Charybdis. A dispute between two government agencies should not enure to the detriment of the clients those agencies are mandated to serve. The Regional Centers are currently engaged in a Superior Court lawsuit, *Edward F. vs. Harbor Regional Center, et al* which should determine whether the Regional Centers are required to provide rate letters to DSS. Courtney W. (hereinafter Courtney or Claimant) belongs to the class of persons represented in that action. As part of that lawsuit, HRC entered into an agreement

[3] The regulations governing facility service levels are found at California Code of Regulations, title 17, section 56001 et seq.

(Interim Agreement) with the class plaintiffs to continue to provide rate letters during the period December 15, 2005 through March 31, 2006. Under this agreement, on March 29, 2006, HRC assigned a service level 3 to Courtney. HRC argued that DDS has no obligation to issue rate letters because DSS has admitted that section 35333, subdivision (c) (1) (C) does not impose a duty on Regional Centers. That is not at issue here. HRC had an obligation to issue a rate letter for Courtney under the Interim Agreement. Whether HRC had an initial obligation to write rate letters is not a topic for adjudication in this decision.

HRC appeared to rely on the ruling in *Association of Regional Center Agencies v. Bolton et al, L*os Angeles Superior Court Case number BS 091175l, for the proposition that OAH does not have jurisdiction with regard to rate letters, and argued that the OAH decisions relied upon by Claimant are inapposite because they pre-date that case (the *ARCA* case). This argument is unpersuasive. On May 17, 2004, ARCA requested the court to repeal California Code of Regulations, title 22, section 35333, or at least subdivision (c) (1) (C) of that section. The court declined to do so. The OAH decisions relied upon by Claimant include post-*ARCA* decisions, as well as decisions that pre-date *ARCA*. On December 15, 2005, the Regional Centers entered into the Interim Agreement under which it issued its most recent rate letter for Courtney.

HRC argues that rate letters issued by the Regional Centers between December 15, 2005 and March 31, 2006 were issued pursuant to a private agreement, "in the spirit of cooperation with other state agencies"[4] and that the setting of ARRM rates is an "administrative decision" by the Regional Centers which is not subject to review by OAH. In fact the "Interim Agreement" entered into in *Edward F. vs. Harbor Regional Center, et al* is not an agreement between DSS and DDS. It is an agreement between the Regional Center Defendants in that case and the Class Plaintiffs. HRC does not dispute that it agreed to continue issuing rate letters until March 31, 2006. Implicit in this agreement was that a class action plaintiff would have a remedy should he or she feel that the assigned ARRM rate was incorrect. While the Regional Centers may have no statutory obligation to provide rate letters, it is incontrovertible that HRC issued rate letters for Courtney both before and after *ARCA*. Having undertaken to do so, HRC must do so in good faith[5] and within its

[4] HRC's opening brief at p.9, line 19.

[5] There is an implied covenant of good faith and fair dealing in *every* contract, meaning that neither party will do anything to destroy or injure the rights of the other to receive the benefits of the contract, including a contract which confers discretion on one party over the rights of another. *California Lettuce Growers, Inc. v Union Sugar Company* (1955) 45 Cal.2d 474; *Okun v Morton* (1988) 203 Cal.App.3d 805. The law implies an obligation to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done. This rule is applicable to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill, and knowledge. *Roscoe Moss Co. v Jenkins* (1942) 55 Cal.App.2d 369.

mandate under the Lanterman Act to prevent or minimize the institutionalization of developmentally disabled persons. An artificial "cap" at level three for severely disabled children, sometimes resulting in monthly AAP payments thousands of dollars less than the cost of institutionalization, is at cross purposes with the Regional Center's mandate to minimize the institutionalization of disabled children. The Lanterman Act requires the Regional Centers to advocate for their clients. Additionally, section 4710.5 states that any applicant for, or recipient of, services. . . who is dissatisfied with any decision or action of the service agency which he or she believes to be not in the recipient's best interest, shall be afforded an opportunity for a Fair Hearing. An internal appeal to HRC would be futile, as Ms. Del Monico has testified that the level 3 rating is the highest level that can be given to a child being taken care of at home. The law does not require a futile act. Therefore, Courtney has exhausted her administrative remedy with HRC. The rate letters HRC issued for Courtney are decisions or actions within the meaning of section 4710.5. These rate letters fall under the broad umbrella of the Lanterman Act and the disputes over Courtney's service needs level is properly before OAH.

Claimant has relied to her detriment on the availability of the Fair Hearing process HRC has insisted upon for this type of dispute.[6] Claimant spent a great deal of time and effort preparing for a hearing on the merits of Claimant's request to have her service level rate increased retroactively. HRC submitted the issue of the appropriateness of Courtney's service level rating to the jurisdiction of OAH. HRC cannot now be heard to argue that OAH is an improper forum in which to raise this issue, or indeed, that as an "administrative decision" an incorrect service level rating is not subject to review. It is often said in the law that "there can be no right without a remedy." The Interim Agreement conferred rights upon Courtney, as an intended beneficiary. Commensurate with those rights was an effective means of resolving disputes regarding rate letters issued under that Agreement. To hold otherwise would result in a manifest miscarriage of justice. HRC is equitably estopped from arguing that the rate letter it issued for Courtney was merely an "administrative decision," not subject to review. See, *Canfield v. Prod,* (1977) 67 Cal.App.3d 722, 730-731.

These obligations extend to HRC under the December 15 agreement. In the event DCFS does not accept the new rate letter to be issued under the below Order, *nunc pro tunc* to November 22, 2003, Claimant, as an intended beneficiary of the December 15 agreement, will have recourse against HRC to make up any shortfall in funds she would have received had HRC properly assessed Claimant's service level needs.

[6] Claimant requested mediation to resolve this issue; however, on April 18, 2006, Delores Burlison, Manager of Rights Assurance, Harbor Regional Center, wrote to Courtney's parents stating that "Although you have asked to pursue your fair hearing through a mediation process, Harbor Regional Center believes that the most effective and speediest means to resolve your concerns will be to ask a third party, *with the authority to make a final decision*, to assist us. By copy of this letter, we are notifying the Office of Administrative Hearings (OAH) that Harbor Regional Center prefers to proceed directly to hearing in this matter (*emphasis added*)."

6. Claimant is a special needs child and a Regional Center Client who was adopted by Mr. and Mrs. W. on November 22, 2003. Mr. and Mrs. W. are divorcing, and Mr. W. is now a single parent. At hearing, the parties stipulated to the following facts:

> Courtney is a five-year-old beautiful, non-ambulatory little girl with cerebral palsy, diffuse cerebral atrophy, poor development of the corpus collosum hindering sensory transfers from one side of the brain to the other, severe developmental delay, moderate to severe mental retardation, gastro esophageal reflux disease, double hiatal hernia, severe oral motor dysfunctions, and possible absent seizure disorder, strabismus, astropia, hip dysplasia, nonfunctional protection reaction, nonfunctional reactive and anticipatory balancing skills, left leg one half inch shorter than right leg, due to left hip derogation, positional kyphosis, (the reverse of scoliosis). Courtney has microphaly at less than the fifth percentile, and severe hypo tonicity in her upper extremities. She has had nine surgeries including three surgeries on her eyes for strabismus, two unsuccessful Botox injection surgeries, double abductor release surgery, bone surgery on her femur, removal of hardware from her femur due to severe bone infection, percutaneous endoscopic gastrostomy surgery (G-Tube). Her body mass index is under fifth percentile for numerous years. She was a five-year-old child that weighed 22 pounds in December of 2005, which is the amount a one-year-old child should weigh, before her hospitalizations due to constant ongoing fevers of an unknown origin. The fevers range from 100 degrees to over 104.7 degrees. As recent as yesterday, she had a fever of 99.9, being taken to the emergency room countless times for vomiting and fevers of unknown origin, the most recent being three weeks ago for possible recurrence of bone infection. Courtney is completely dependent on [her father] and [his] Aunt Elva for all functioning, mobility, and life skills, including being completely dependent on floor mobility, or any transfers. She is non-ambulatory; she is completely dependent on others for dressing, community skills, any home skills, toileting, bathing and feeding. Unfortunately, Courtney has not made any significant gains in her voluntary purposeful use for upper extremities since her last evaluation. Courtney cannot use both hands to hold a sipper cup. She is completely dependant for dressing, as she does not voluntarily put her limbs through a shirt or pants. She is completely dependant for grooming hygiene, but does allow her nose to be wiped. Courtney is incontinent and must wear diapers. Courtney does not attend school from one-third to one-half of her school time, due to numerous hospitalizations and countless doctors' appointments. Her medications include Baclophen, Carafate, Prevacid, Reglan, Glycomax, Polysporin, acetaminophen and ibuprofen.
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> *Claimant's Opening brief, para. 2*

7. On March 24, 2006, the DCFS sent a letter to HRC requesting an updated ARRM rate letter for Courtney. DFCS requested that HRC consider a service level of 4(E) to 4 (G), based on the severity of her needs. On March 29, 2006, HRC issued a rate letter to DCFS on Claimant's behalf. HRC assessed Claimant at a level 3, based on her severe disabilities. Ms. Patricia Del Monico, Director of HRC, testified that she assigned Courtney a level 3 rating after reviewing her file, because level 3 is the highest level ARRM rate that can be given for a child living at home. Ms. Del Monico did not recall meeting Courtney, but she remembered Courtney's file. Ms. Del Monico testified that she had, some time ago, instituted the policy of not giving ARRM rates higher than a level 3 for children living at home. She testified that other Regional Centers were in accord with her decision. This testimony was not completely correct. The ALJ takes official notice of the decisions in *Mikquail D. v. North Los Angeles Regional Center, Case No. L2005070954; Canyon C. vs. Regional Center of Orange*, Case No. L 2002100299; *D. Samuel R. vs. Southern Central Los Angeles Regional Center*, Case No. L2003090715; and *Russell M. vs. Harbor Regional Center*, Case No. L2006030159. In November of 2003, North Los Angeles Regional Center assessed claimant *Mikquail D.* at a service level 4(E). In *Canyon C*, the Regional Center of Orange had assigned the claimant a level of 4(C) in 2001, and a level of 4(A) in 2004. In *D Samuel R*, the South Central Los Angeles Regional Center assigned the claimant an ARRM rate of 4(A). In *Russell M. vs. Harbor Regional Center*, HRC had at one point assigned the claimant an ARRM rate of 4(I). All of these claimants were living at home, either with their adoptive or adopting families. Accordingly, it is clear that Level 3 is not the highest ARRM rate that can be assigned to a Regional Center client living at home.

Convening the Living Options Committee would be unnecessary to determine the Service level needs of an HRC client with severe disabilities, as that client would automatically be assigned an ARRM rate of level 3 under Ms. Del Monico's policy. Ms. Del Monico's policy limits ratings to levels 1, 2 and 3. This policy automatically excludes any level 4 ratings. Under this inflexible policy, no child would ever be assessed at a level 4 for purposes of a rate letter. Ms. Del Monico's rationale for excluding level 4 ratings was that level 3 is the highest level assigned to owner-operated facilities because these operators do not bear the expense of providing a separate residence for themselves. By analogy, Ms. Del Monico believes that level 3 should also be the highest level ARRM rate assigned to a child living with his/her adoptive parents, and therefore, level 4 ratings simply are not applicable. Claimant argued that Ms. Del Monico's analogy is not apt because in issuing an ARRM rate letter, HRC is required to assess the service level needs of the child, as opposed to making an arbitrary decision based on the fact that the child is being taken care of at home. Claimant's argument is persuasive. Under California Code of Regulations title 22, section 35333, it is the responsibility of DSS, not the Regional Center, to consider the circumstances of the adoptive family in setting an AAP rate. HRC's responsibility under that section, if in fact it has any, is simply to assess the service level needs of the child.

8. Service level 4 provides "Care, supervision, and professionally supervised training for persons with deficits in self-help skills, and/or severe impairment in physical coordination and mobility. . ." Betsey Jennings, a counselor at HRC who is familiar with Courtney and her special needs, testified that if HRC were to place Courtney in an

institutional setting, it would be a level 4 home. She also testified that, while a committee would have to determine an actual placement, the criteria for a service level of 4(H) to 4 (I) "sounds like Courtney." Ms. Jennings has previously participated in Living Options Committee Meetings at HRC; however, she does not do so in her present role. Claimant did not request that HRC consider a service level of 4(H) to 4(I) when filing the Fair Hearing Request. HRC did not have proper notice of this issue and was not afforded a proper opportunity to prepare to address this argument at hearing. Therefore, the issue of whether Claimant should be given a service level rating of 4(H) or 4 (I) was not properly before the ALJ and will not be considered here. Moreover, as set forth in more detail below, based on the evidence presented at the hearing, Courtney should be assessed at service level 4(E).

9. The evidence at hearing shows that Claimant should have received a service level rating of 4(D) or 4(E). Service level 4(A) to 4(D):

> [C]an be used for children with moderate to severe mental retardation but who are *usually* ambulatory; they may have some special medical needs (such as g-tube feedings or infrequent episodes of swallowing problems, routine nursing care and monitoring requirements, ongoing office visits with a pediatrician and GI specialists); they may have more school absences than a typically developing child but they should not be of frequent or long duration; they may have behavior challenges that require attention to antecedents and the consistent use of reinforcement for positive behavior." These levels assume a staff-to-client ratio of about 1:2.
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> Level 4(E) to 4(G):
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> [C]an be used for children with severe to profound mental retardation who may also be non-ambulatory; they may also have seizures controlled by medication; they may have cerebral palsy resulting in quadriplegia; they may have a gastrostomy tube or a tracheotomy; they may have periodic hospitalizations; there would usually be more frequent pediatrician and specialist visits and more frequent absences from school; they may have behavior challenges that could result in property damage or assaults on others. These levels assume a staff-to-client ratio of about 1 and ½ to 2.

Based on the evidence adduced at hearing, Courtney does not fit neatly into either category 4(D) or 4(E). She appears to fall somewhere in between. However, there exists no level in between 4(D) and 4(E). The parties stipulated that Courtney is moderately to severely mentally retarded. This supports assigning Courtney a level 4(D). However, clients placed in category 4(D) are "usually ambulatory;" Courtney is not. The parties also stipulated that Courtney has cerebral palsy, she has a g-tube, she must be given various medications, and she misses school more often than a typically developing child due to ongoing doctor visits and hospitalizations. These characteristics support assigning Courtney a level 4 (E). Since the service level rate is a starting point from which the responsible county social services department

negotiates downward the amount of the AAP payment, the most appropriate level to assign Courtney is a level 4(E). The new rate letter HRC will be required to issue in the below Order, will be made retroactive to November 22, 2003.

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ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Claimant's appeal of HRC's assessment of Claimant's level of care is granted.

2. HRC shall forthwith issue a new letter to the Department of Children and Family Services, Adoption Assistance Unit, and/or to Claimant's father, designating Claimant's service level at Level 4(E) (corresponding payment rate $3,714 per month). Said letter shall specifically state that it is issued in replacement of the rate letter HRC issued on March 29, 2006, and any previous rate letters issued for Courtney, and that the replacement rate letter is intended by HRC to be retroactive to November 22, 2003. HRC may state in the letter that the Level 4(E) assessed level of care is solely for the purpose of assessing Claimant in order to determine the appropriate AAP rate.

Date: August 24, 2006

SANDRA L. HITT
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.